IN THE

Supreme Court of the United States

October Term, 1966
No. 949

Estate of MAX STEINBERG, *et al.*,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MEMORANDUM OF PETITIONERS IN REPLY.

Respondent now, although in carefully chosen words, clearly confesses error of the court below—the error pointed out in our Petition, p. 6, which contains a clear conflict with the Ninth Circuit. Respondent attempts to counter the error by completely shifting his position, asserting, and for the first time, that petitioners have not been prejudiced, that they have not indicated any evidence they failed to offer because of belief that the Commissioner was limiting his case to proof of unreported income of Max alone.

But just as it is possible, under the doctrine of *United States v. Massei*, 355 U.S. 595, for the Commissioner to prove a negative, the non-existence of "all possible sources" of nontaxable income, so it is possible for the

taxpayer to prove a negative, the non-existence of "all possible sources" of taxable income. Had petitioners even suspected that the Commissioner was alleging taxable income of Pearl as well as Max, or of Pearl and Max "as a husband and wife team," they would have proceeded to prove the non-existence of all possible sources of such income.

In view of respondent's shift of position, the least to which we should be entitled now is the opportunity to make that proof. *Hormel v. Helvering,* 312 U.S. 552, 560, cited here by respondent on that very point. We should not be required to make it, since the Commissioner has, we submit, already admitted, in effect, that no sources of such taxable income exist. But we are prepared to make that proof, if required.

We submit now also that the issue is one of the greatest importance in the administration of the revenue. We refer, of course, to the second of the questions presented in our petition. The tax law services show that net-worth fraud cases are among the most common in the entire field of tax litigation. *Massei* made it possible in such a case for the Commissioner to carry his burden of proof by showing, in addition to his net-worth computation, the non-existence of "all possible sources" of nontaxable income. Correspondingly the taxpayer should be allowed to defend by showing the non-existence of all possible sources of taxable income. The effect, of course, adding together the two negative showings, and assuming the term "income" to cover any kind of addition to net worth, would be that the Commissioner may have erred in his net-worth computation, such as by failing to prove the non-existence of any additional opening assets.

In any case, we submit that the Commissioner's confession of error of the court below, in respect to the meaning of his answer in the Tax Court—an error which contains a clear conflict with the Ninth Circuit—dictates that the petition should be granted and a hearing held by this Court.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.